

THOMAS A. MARSHALL
ATTORNEY AT LAW

P.O. Box 223
Frankfort, Kentucky 40602

212 Washington Street
Telephone: (502) 223-4723
~~MARSHALL@KDC.COM~~

September 19, 2003

RECEIVED

SEP 19 2003

PUBLIC SERVICE
COMMISSION

Mr. Thomas Dorman
Executive Director
Kentucky Public Service Commission
P.O. Box 615
211 Sower Blvd.
Frankfort, KY 40602-0615

Petition by Doe Valley Utilities, Inc.

Dear Mr. Dorman:

Case 2003-00360

Enclosed for you and your staff are the original and 10 copies of the Petition filed on behalf of Doe Valley Utilities, Inc. Copies of this Petition will be provided to the following customers of Doe Valley Utilities, Inc. All customer addresses are in Brandenburg, Kentucky at zip code 40108 and are more specifically stated as appears below. Additionally, copies will be provided to Meade County Water District and the Doe Valley Association, Inc.

Edith Harrington
250 Lakeshore Parkway

Wayne Russell
210 Lakeshore Parkway

Sharon Jones
200 Lakeshore Parkway

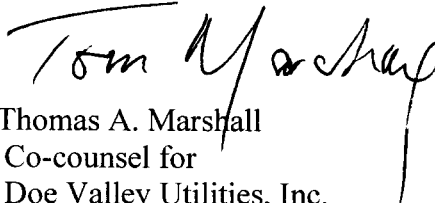
Randall Benham
5791 Olin Road

Roy Dean Benham
5745 Olin Road

Vulcan Materials
4060 Ohio Road

Your assistance is greatly appreciated. If you should need to speak with me, please call 223-4723.

Sincerely,



Thomas A. Marshall
Co-counsel for
Doe Valley Utilities, Inc.

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

SEP 19 2003

PUBLIC SERVICE
COMMISSION

In the Matter of:

Doe Valley Utilities, Inc.)
Petition for Determination As To)
Jurisdictional Status Of Doe Valley)
Utilities, Inc., And Additional Or Alternative)
Determinations)

Case No. 2003-00360

Comes the Petitioner, Doe Valley Utilities, Inc., and hereby requests that the Kentucky Public Service Commission determine that Doe Valley Utilities, Inc. is not a public utility, and states as follows:

1. Doe Valley Utilities, Inc. ("DVU") is a Kentucky corporation, that provides water and sewage treatment services for residents and property owners of the Doe Valley subdivision, commonly referred to as a "gated" community, which was begun during the 1960's in Meade County, Kentucky.

2. At the time construction of Doe Valley subdivision ("Doe Valley") was begun, there was no water system to supply the portion of Meade County where Doe Valley is situated. Indeed, it is believed that Meade County Water District had not yet been created.

3. Meade County Water District now has a distribution line that is in close proximity to five (5) residential customers who are currently served by DVU. These customers are outside the Doe Valley subdivision and are the only non-subdivision customers who are served by DVU, except for a Vulcan Materials facility that is approximately one mile from the Meade County distribution line.

4. DVU has provided service to Vulcan Materials and the five residential customers for many years. During this time, one of the residential customers has begun a poultry operation. DVU has recently been advised that the customer with the poultry operation is now taking a portion of his water from Meade County Water District.

5. The customers outside the boundaries of the Doe Valley development were given service due to the fact that at the time the Doe Valley water system was installed there was no other reliable potable water supply in the vicinity that was available to them.

6. DVU has not sought to extend its service beyond the confines of Doe Valley, except for the six customers who have been customers for much, if not all, of the time that Doe Valley has existed.

7. DVU has included in its by-laws a provision stating that it will not extend service beyond Doe Valley except for the aforementioned customers who historically have been served. (Attachment 1).

8. DVU was never intended to be a utility that would offer its services indiscriminately. It has only served a few customers outside the boundaries of Doe Valley, and has not expanded to serve the public generally. Indeed, it only acted as a good neighbor in providing water to the six customers, and did not do so in order to offer to the public at large or to be subjected to regulatory controls and requirements meant to protect against a monopolistic entity that provided a service desired by the general populace.

9. DVU now finds it is approaching the capacity limits of its current water treatment facility.

10. DVU's foremost obligation is to serve those persons who are within the boundaries of Doe Valley.

11. KRS 278.010(3)(d) is the statutory section which grants to the Commission its jurisdiction over utilities that provide "water to, or for the public, for compensation."

12. Under the current circumstances, DVU believes that it is appropriate and in the general best interest for DVU to ask that it be determined and declared by order that it is not a utility that provides water to the public, and therefore is not under the jurisdiction of the Commission. Service under the circumstances previously described and to such a small number of customers should not be deemed to be service to the public. In reviewing the precedents regarding the definition of a public utility, the Supreme Court of Ohio has said that "...an entity may be characterized as a public utility if the nature of its operation is a matter of public concern, and membership is indiscriminately and reasonably made available to the general public." *Marano et. al. V. Gibbs et. al.*, 45 Ohio St. 3d 310, 544 N.E.2d 635 (1989).

13. DVU is a wholly owned subsidiary of Doe Valley Association, Inc. ("DVA") a property owners association. DVU is not ready, able or willing to serve the general public. DVU believes that it should be and is a private utility, and does not have sufficient indicia to be categorized as a public utility. It does not exercise state police powers, and is not eligible as are governmental entities for public monies, such as those provided by the Kentucky Infrastructure Authority, for construction and extension of service. It is not a publicly traded entity that has access to capital markets. It is not a subdivision of state or local government with an extended general service area for which it has an obligation to provide service.

14. DVU further submits that it is not a public utility and has no public to serve in that Meade County Water District has extended its water distribution system along a public road in the vicinity of the five residential customers previously identified as being served by DVU. As a true public utility, Meade County Water District services are indiscriminately made available to the general public. Also, as previously stated, DVU believes that one of its customers has already had a meter installed in order to be able to take some portion of his water from the District. DVU has approached Meade County Water District about its acquiring and serving these customers. The District indicated that they would do so if the connection to the customers could be made at no expense to the District. DVU and Doe Valley Association, Inc. have discussed the possibility of assisting with reasonable expenses associated with providing service lines and taps between the customers and the District. Before proceeding with this approach it was considered to be prudent to ask the Commission to consider whether it would approve the transfer of these customers to the District.

15. KRS 74.012 provides that "[b]efore the Public Service Commission shall approve any application for creation of a water district or water association, the commission must make a finding and determination of fact that the geographical area sought to be served by such proposed water district or water association cannot feasibly be served by any existing water supplier, whether publicly or privately owned, and whether or not subject to the regulatory jurisdiction of the commission." Accordingly, when the Commission approved the establishment of the Water District, it made an implied finding and determination that it was not feasible for DVU to continue to serve the extra-territorial customers in perpetuity, and that those customers should have their

service provided by Meade County when the Water District extended lines into that geographical area of Meade County. If not, then DVU believes that the Commission should now recognize that the District is the appropriate entity to serve customers who are not associated with Doe Valley.

16. If the Commission transfers the five customers in the vicinity of the Meade County Water District distribution line to that public utility, these customers immediately have a public water supply from a statutorily established regulated utility that currently has sufficient capacity, has an obligation to serve, and which would benefit from growth in its customer base. As for Vulcan Materials, the Commission could and should find that service to a single customer does not constitute service to the public.

17. Alternatively, DVU asks that the Commission find that the entry and adoption of the attached quitclaim deed agreement (Attachment 1) would be sufficient for the Commission to determine that DVU water service to those entering the fully executed agreement would not be service to the public. This proposal is dependent upon none of these customers remaining in a status whereby DVU would be subject to the requirements and obligations of KRS Chapter 278. In Commission Case 92-467, involving the approval of the transfer of the stock of DVU to Doe Valley Association, Inc. the Commission was asked to determine that DVU would not be subject to Commission jurisdiction. The request was denied, but the Commission indicated that if nonresidents were to become members of the association, then DVU would no longer be under the Commission's jurisdiction. The proposed quitclaim deed is drawn so as to be entered into between the customer and the association, and making them eligible for water service. DVU asks that the Commission acknowledge or authorize that these

customers at issue are required to execute the quitclaim deed as a condition of service. It is understood by DVU that the Doe Valley Association, Inc. will only enter into these agreements once the Commission determines that it will not assert jurisdiction once the terms are accepted by the parties.

18. As regards the pending lack of capacity of the current DVU treatment facilities, the Board of Directors has determined that there is a pressing need to construct a water treatment facility for DVU in order to better serve its existing customers, to provide for adequate fire protection for the Doe Valley development, to address the current source of supply concerns, and to ensure the use of the safest and most environmentally beneficial technology in water treatment to meet the needs of the residents of the Doe Valley development.

19. DVU previously applied for a certificate of public convenience and necessity for this water treatment facility, which was denied by the Commission in Case No. 2002-353.

20. Since the Commission's final action denying the certificate of public convenience and necessity, DVU's Board has been advised that Doe Valley Association, Inc. (DVA), is willing and has a means of financing the construction of a new water treatment facility, and that such construction could be paid for in full through DVA with no obligations or costs to DVU.

21. DVU asks for a determination as to whether a certificate of convenience and necessity is required for a water production facility when the proposed facility is to be constructed at no cost to the utility and therefore there is no effect on rates.

22. DVU asks that if and where possible there be an expedited order as to any or all of the foregoing issues.

CONCLUSION

For the reasons stated above, Doe Valley Utilities, Inc., respectfully requests that the Commission enter an ORDER determining as follows:

1. Doe Valley Utilities, Inc. is not within the regulatory jurisdiction of the Public Service Commission because it does not provide "water to or for the public, for compensation" as required by KRS 278.010(3)(d).

2. In the alternative, if the Commission finds that the provision of water services to the customers who reside outside the Doe Valley development renders DVU jurisdictional utility, DVU asks that the Commission transfer those customers to Meade County Water District, which is now available to those customers as a public water supplier. If the customers should object to service from Meade County Water District, a second alternative may be for the Commission to determine that DVU can require those customers to become members of the Doe Valley Association, Inc., by executing the quitclaim deed attached to the DVU petition, as a condition of continued service by DVU.

3. DVU further requests that the Commission find and determine that DVU, if under the jurisdiction of the Commission, is not required to obtain a certificate of public convenience and necessity for any water treatment facility that is funded exclusively by a third party, such as the Doe Valley Association, Inc., and for which DVU will not incur any financial obligation for construction.

4.. DVU respectfully requests an expedited ruling on this petition.

Respectfully submitted,

Phillip J. Shepherd

PHILLIP J. SHEPHERD

By TAm

307 West Main Street

P.O. Box 782

Frankfort, Kentucky 40602

502/227-1122

Thomas A. Marshall

THOMAS A. MARSHALL

212 Washington Street

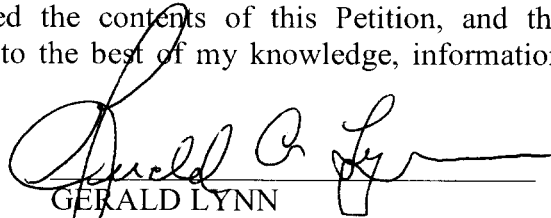
P.O. Box 223

Frankfort, Kentucky 40602

502/223-4723

Verification

I, Gerald Lynn, President of the Board of Directors of Doe Valley Utilities, Inc., do hereby certify that I have reviewed the contents of this Petition, and that the allegations therein are true and correct to the best of my knowledge, information, and belief.


GERALD LYNN

Subscribed and sworn to or affirmed before me, a notary public, this 17th day of September, 2003.


NOTARY PUBLIC, STATE-AT-LARGE

My Commission Expires: 19th June 2005

**CORPORATE RESOLUTION
BOARD OF DIRECTORS OF
DOE VALLEY UTILITIES, INC.**

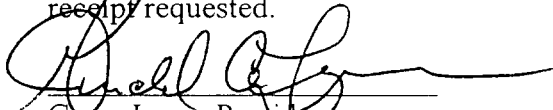
At a Regular Meeting of the Board of Directors of Doe Valley Utilities, Inc. on September 17, 2003, the following resolution was adopted by the Board of Directors:

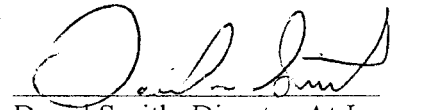
Be it resolved that Doe Valley Utilities, Inc. have passed a motion to amend their by-laws to include the following by-law;

ARTICLE XV

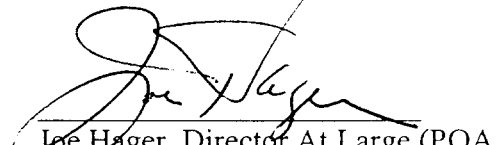
SECTION 1. Doe Valley Utilities, Inc. shall not provide utility services, including water or sewage services, to any customer who is not a shareholder, a member of the Doe Valley Association, Inc., a resident or property owner of Doe Valley subdivision in Meade County, Kentucky, or an existing customer of Doe Valley Utilities, Inc. as of September 1, 2003.


SECTION 2. This By-Law shall not be altered or amended without prior notice to the Executive Director, Kentucky Public Service Commission, P.O. Box 615, 211 Sower Blvd. Frankfort, Kentucky 40602, said notice to be served by U.S. Post Office, certified mail, return receipt requested.


Gerry Lynn, President


David Smith, Director At Large



Joseph A. Nepi, Vice President


Joe Hager, Director At Large (POA Representative)


Trent Decker, Secretary/Treasurer

CERTIFICATION

I certify that the above resolution was adopted by the Board of Directors of the Doe Valley Utilities, Inc., on September 17, 2003.


Carol Nepi, General Manager

GRANTOR: DOE VALLEY ASSOCIATION, INC.
GRANTEES: RANDALL BENHAM, ROY DEAN BENHAM, SHARON C. JONES,
EDITH HARRINGTON, WAYNE RUSSELL &
on behalf of VULCAN MATERIALS COMPANY
FVA #: 135-50-05-733
FAIR MARKET VALUE: \$2,500.00
PROPERTY ADDRESS:
LEGAL DESCRIPTION: Lot 733, Wildflower Ridge Section of Doe Valley
Subdivision

QUITCLAIM DEED

THIS QUITCLAIM DEED made and entered into this _____ day of _____, 2003, by and between DOE VALLEY ASSOCIATION, INC., a Kentucky corporation, whose address is One Doe Valley Parkway, Brandenburg, Kentucky, 40108, Party of the First Part, and RANDALL BENHAM, ROY DEAN BENHAM, SHARON C. JONES, EDITH HARRINGTON, WAYNE RUSSELL and _____ on behalf of VULCAN MATERIALS COMPANY, c/o Doe Valley Association, Inc., One Doe Valley Parkway, Brandenburg, Kentucky, 40108, Parties of the Second Part,

WITNESSETH, that for and in consideration of one dollar (\$1.00) and other good and valuable consideration, receipt of which is hereby acknowledged, Party of the First Party does hereby grant, bargain, sell, and convey unto Parties of the Second Part, as hereinafter set out, the following described real estate located in Meade County, Kentucky, to wit:

Being Lot No. 733, Wildflower Ridge Section of Doe Valley Subdivision, per plat of same in Plat Book 2, Pages 45, in the Meade County Clerk's office.

Being the same property conveyed to Party of the First Part by Quitclaim Deed from Hope Mitchner and Kent Mitchner, dated the February 19, 2003, and same being of record in Deed Book 468, page 193, in the Meade County Clerk's office.

HUDDLESTON
6
VAN ZANT, P. S. C.
ATTORNEYS AT LAW
68 WEST
POPULAR STREET
POST OFFICE BOX 844
ELIZABETHTOWN, KY
41024-0844
TELEPHONE
270-766-4196
FAX
270-737-4790

The fair market value of the above-described property, as shown on the records of the Meade County PVA office, is \$2,500.00.

Each of the Parties of the Second Part own an undivided one-sixth (1/6) interest in the above-described property so long as each member of Parties of the Second Part uses water furnished by Party of the First Part, or its subsidiary, and said water shall be used only for residential purposes, except in the case of Vulcan Materials Company. Should any member of Parties of the Second Part cease using water furnished by Party of the First Part, that member of Parties of the Second Part shall reconvey his and/or her interest in the above-described property back to Party of the First Part. Each member of Parties of the Second Part agrees to pay the normal, usual, and customary rates and charges for water furnished by Party of the First Part to other members of Doe Valley.

Party of the First Part shall pay all real estate taxes on the above-described property for the present year, and all future years.

Each member of Parties of the Second Part shall be considered a non-voting member of Doe Valley Association, Inc., but each such member shall not be responsible for payment of any dues or assessments, nor shall any such member, by reason of this Deed alone, have access to any of the facilities of Party of the First Part.

In the event Party of the First Part, or its subsidiary, ever ceases to furnish water to Parties of the Second Part, then, and

in that event, Parties of the Second Part shall deed the above property back to Party of the First Part.

Vulcan Materials Company takes title to its one-sixth (1/6) interest in the name of the person designated in this Deed and should it ever be necessary for Vulcan Materials Company to deed its interest back to Party of the First Part, said deed may be executed by the person holding the same or comparable office with Vulcan Materials Company.

This Deed shall be binding on the heirs and assigns of the parties.

TO HAVE AND TO HOLD unto Parties of the Second Part, to each member thereof an undivided one-sixth (1/6) interest in the above-described property.

The parties hereto state under oath that there is no monetary consideration paid for the aforesaid property and that the consideration reflected in this Deed is the full consideration for the property.

WITNESS the hands of the parties this day and year first above written.

PARTY OF THE FIRST PART:

DOE VALLEY ASSOCIATION, INC.

By: _____

Title: _____

PARTIES OF THE SECOND PART:

RANDALL BENHAM

HUDDLESTON
6
VAN ZANT, P. S. C.
ATTORNEYS AT LAW
108 WEST
POPLAR STREET
POST OFFICE BOX 844
ELIZABETHTOWN KY
42702-0844
TELEPHONE
270/748-4138
FAX
270/737-4790

ROY DEAN BENHAM

SHARON C. JONES

EDITH HARRINGTON

WAYNE RUSSELL

VULCAN MATERIALS COMPANY:

By: _____

Title: _____

STATE OF KENTUCKY

COUNTY OF MEADE

The foregoing Quitclaim Deed with certificate of consideration was subscribed, sworn to, and acknowledged before me this _____ day of _____, 2003, by _____ in his/her capacity as _____ of Doe Valley Association, Inc., Party of the First Part.

NOTARY PUBLIC

My Commission Expires:

STATE OF KENTUCKY

COUNTY OF MEADE

The foregoing certificate of consideration was subscribed, sworn to, and acknowledged before me this _____ day of _____, 2003, by Randall Benham, Party of the Second Part.

NOTARY PUBLIC

My Commission Expires:

HUDDLESTON

&

VAN ZANT, P. S. C.

ATTORNEYS AT LAW

100 WEST

POPLAR STREET

POST OFFICE BOX 844

ELIZABETHTOWN KY

42702-0844

TELEPHONE

2701-7337-4198

FAX

2701-7337-4780

STATE OF KENTUCKY

COUNTY OF MEADE

The foregoing certificate of consideration was subscribed, sworn to, and acknowledged before me this _____ day of _____, 2003, by Roy Dean Benham, Party of the Second Part.

NOTARY PUBLIC

My Commission Expires:

STATE OF KENTUCKY

COUNTY OF MEADE

The foregoing certificate of consideration was subscribed, sworn to, and acknowledged before me this _____ day of _____, 2003, by Sharon C. Jones, Party of the Second Part.

NOTARY PUBLIC

My Commission Expires:

STATE OF KENTUCKY

COUNTY OF MEADE

The foregoing certificate of consideration was subscribed, sworn to, and acknowledged before me this _____ day of _____, 2003, by Edith Harrington, Party of the Second Part.

NOTARY PUBLIC

My Commission Expires:

STATE OF KENTUCKY

COUNTY OF MEADE

The foregoing certificate of consideration was subscribed, sworn to, and acknowledged before me this _____ day of _____, 2003, by Wayne Russell, Party of the Second Part.

NOTARY PUBLIC

My Commission Expires:

HUDDLESTON
&
VAN ZANT, P. S. C.
ATTORNEYS AT LAW
100 WEST
POPLAR STREET
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ELIZABETHTOWN, KY
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STATE OF KENTUCKY

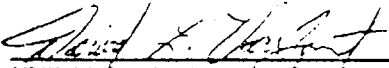
COUNTY OF MEADE

The foregoing certificate of consideration was subscribed, sworn to, and acknowledged before me this _____ day of _____, 2003, by _____ as _____ of Vulcan Materials Company, for and on behalf of said Company, Party of the Second Part.

NOTARY PUBLIC

My Commission Expires:

PREPARED BY:



HUDDLESTON & VAN ZANT, P.S.C.
109 W. Poplar St., PO Box 844
Elizabethtown, KY 42702-0844
(270) 765-4196

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